No. 6341

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Appellant,

vs.

California Sea Products Company, a corporation,

Appellee.

APPELLANT'S BRIEF.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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STATEMENT OF THE CASE.

(Figures in brackets refer to pages of the Apostles. Italics are ours unless otherwise noted.)

The appellant is a corporation organized and existing under and by virtue of the laws of the state of Kansas and is, and was at the times named in appellee's libel, a common carrier, engaged in interstate and intrastate commerce, and was the owner of a certain tugboat called "A. H. Payson," which was operated on San Francisco Bay and perhaps elsewhere. That on November 16, 1926, said tugboat collided with the appellee's steamer named "Lansing" while said steamer was moored at a berth

on the south side of pier No. 46 on the water front of San Francisco Harbor, causing certain damages to the steamer "Lansing." [Apost. p. 51.]

That the appellee for some time prior to November 16, 1926, the exact time being uncertain, was a corporation engaged in whaling on the high seas; that in its whaling operations and at all times prior to November 16, 1926, the appellee would take its captured whales ashore and render them into salable products at two land stations located at Monterey, California, and Trinidad, California. However, in June, 1926, the appellee purchased an old oil tanker from the Union Oil Company, having conceived the idea of converting this oil tanker into a floating whaling factory for the purpose of rendering the captured whales into salable products while at sea, by using the said converted oil tanker as a whaling factory. At no time prior to November 16, 1926, had the appellee ever used a floating whaling factory. [Apost. p. 77.]

Upon the completion of the "Lansing" into this floating whaling factory it was contemplated by the appellee to take the said "Lansing," accompanied by certain smaller "killer" boats, down to the waters off San Clemente Island for the purpose of fishing for whales and, if any were captured, to render the same into salable products by the use of the new floating factory. [Apost. pp. 64, 65, 82.]

On November 16, 1926, the work of converting the oil tanker "Lansing" into this floating whaling factory was nearly completed. The only work remaining to be done was the testing out of certain tanks therein and

for that purpose she was docked alongside the aforesaid pier in San Francisco Bay, and was in said uncompleted condition and at said place when she was rammed and damaged by the appellant's tugboat as aforesaid.

The appellee arrived in the San Clemente waters with the "Lansing" and "killer" boats on December 19, 1926, and claims that, had it not been for the collision, appellee would have arrived there six days earlier, or on December 14, 1926. [Apost. p. 158.]

As a result of this collision the appellee filed a libel against the appellant in this case, claiming damages for repairs and detention of the vessel.

That as a result of this collision certain repairs were made necessary to the steamer "Lansing," which repairs were effected at a cost of $3,554.09. [Apost., p. 5.]

The repairs to the vessel, made necessary on account of the collision, were completed on November 22nd, 1926, six days having been required to effect them. [Apost. pp. 104, 107.]

That thereafter and on October 17, 1927, the appellant and appellee entered into a stipulation in writing that the said collision was due to the sole fault of the tugboat "A. H. Payson," owned by the appellant, and said stipulation further provided that appellee have and recover from the appellant whatever damages, if any, that were sustained by reason of said collision. [Apost., p. 7.] And said appellant, in accordance with said stipulation, paid the aforesaid cost of repairs, in the sum of $3,554.09, receipt of which was duly acknowledged by the appellee. [Apost., p. 5.]

That on the 18th day of October, 1927, there was made and filed herein an interlocutory decree, based upon the aforesaid stipulation, wherein it was specified that the collision was due to the sole fault of appellant's tugboat "E. H. Payson," and that the appellee should have and recover from the appellant whatever damages, if any, it sustained by reason of the matters alleged in the libel, together with interest and costs. and further providing that Francis Krull, Esq., United States Commissioner, should ascertain and compute the amount due to libellant in the premises and to report the same to the court. [Apost., p. 8.]

REPORT OF SPECIAL MASTER.

Thereafter, and on July 15, 1930, the said Francis Krull, special Master, filed his report awarding the appellee the sum of $1,870.48, as demurrage, being the profits on six whales, which said Special Master found the appellee would have captured, with reasonable certainty, during the time that the steamer "Lansing" was laid up for the repairs aforesaid. [Apost., p. 14.]

That exceptions to the report of Special Master Francis Krull were duly made and filed by the appellant. [Apost. p. 18.] Whereupon the court ordered that said exceptions be overruled and the Commissioner's report was duly confirmed [Apost. p. 28], appellant excepting thereto.

Thereafter and on November 17, 1930, the court made and entered its final decree herein, based upon the report of Special Master Francis Krull, and by the terms of said decree awarded the appellee damages in the sum of $1,870.48, with interest and costs. [Apost. p. 36.] All of which was duly excepted to.

THE APPEAL.

is from the final decree of judgment of the United States District Court for the Northern District of California, Southern Division, made and entered on the 17th day of November, 1930, awarding appellee damages in the sum of $1,870.48, together with interest and costs, as demurrage alleged to have been due appellee on account of the detention of appellee's steamer "Lansing" to undergo repairs, occasioned through appellant's negligence.

THE CONTROVERSY.

arises on account of the claim of appellee that its steamer "Lansing", and accompanying "Killer" boats, were delayed, by reason of the collision, six days in starting on a whale fishing expedition in the San Clemente waters, and, consequently, lost the profits of six days fishing; whereas, the appellant contends that such claimed profits were too speculative, conjectural and remote, under the uncontradicted evidence, to be the subject of legal damages, and that appellee's proposed whale fishing expedition was, in fact, a new venture and undertaking and that no established business or occupation of appellee was interrupted.

Thereafter the appellant made and filed its assignment of errors [Apost. p. 358], which are relied upon in this appeal.

APPELLANT'S ASSIGNMENT OF ERRORS.

I.

The court erred in awarding damages to libellant in any sum whatever for its alleged loss of six days of whale fishing, for the reason that the evidence was too uncertain, speculative and conjectural, to be made the basis of a verdict for damages, and, in support of this,

respondent calls attention to the following, as shown by the evidence:

(a) That the use of a floating whaling factory was a new business or enterprise, and wholly untried;

(b) That the libellant had never before been engaged in whaling in the San Clemente waters;

(c) That there is no evidence that either the libellant or anyone else ever before had engaged in whaling operations in the San Clemente waters;

(d) That the only evidence of the probability of capturing any number of whales, within the period complained of, was the number of whales that were subsequently captured in the San Clemente waters;

(e) There was no evidence that whaling was a seasonable occupation in the San Clemente waters.

For all of the reasons above urged any damages assessed by the court was in no way warranted by the evidence. [Apost. pp. 358-359.]

II.

The court erred in awarding damages to libellant in any sum for its alleged loss of six days of whale fishing for the reason that, on account of there being no evidence that whaling was a seasonable occupation in the San Clemente waters, the libellant, by remaining in the San Clemente waters for a longer period of time, could have recouped its loss, if there was any loss. [Apost. p. 359.]

III.

That the court erred in receiving or considering any evidence of the number of whales caught subsequent to

the period complained of, particularly in the absence of any evidence of the number of whales caught by libellant or anyone else prior to, or at the time of, the period complained of, for the reason that the court only had the right to award damages for the interruption of an established business; and in the absence of any legal evidence of the capture of whales previous to or contemporaneously with the time complained of, there was no just basis for the awarding of damages. [Apost. p. 359.]

VII.

That the court erred in making the following finding of fact:

> "X. That libellant captured thirty-five whales in the waters of San Clemente Island in the month of December, 1926, and sixty-seven whales in the month [296] of December, 1927."

For the reason that the same was wholly immaterial to the issues involved. [Apost. p. 360.]

IX.

The court erred in making the following finding of fact:

> "XII. That weather and sea conditions in the waters of San Clemente Island from the 13th day of December, 1926, until the 19th day of December, 1926, were favorable to the capture of whales."

as this finding is not supported by any legal evidence. [Apost. p. 361.]

X.

The court erred in making the following finding of fact:

> "XIII. That the capture of whales in the San Clemente Island is a seasonable occupation,"

for the reason that the only evidence in support of this finding, aside from the number of whales actually caught, is the testimony of F. K. Dedrick, president and general manager of libellant, wherein he said:

> "Down here off San Clemente and Southern California you can operate the whole winter if you want to, if you find any whales down there." [Apost. p. 361.]

XI.

The court erred in making the following finding of fact:

> "XIV. That during the period from December 13, 1926, until December 19, 1926, libellant could, with reasonable certainty, have captured six whales in the waters of San Clemente Island,"

for the reason that there is no evidence that either libellant or anyone else were ever engaged in whaling in the waters of [297] San Clemente Island at any time previous to December 13, 1926. [Apost. p. 362.]

POINTS AND AUTHORITIES RELIED ON BY APPELLANT FOR REVERSAL.

I.

Demurrage or damages for the loss of profits in the use of a vessel pending repairs, arising from a collision, are allowable only when profits have actually been lost, or may reasonably be presumed to have been, and only when the amount of such profits is proved with reasonable certainty.

> *Cuyamel Fruit Co. et al. v. Nedland et al.*, 19 Fed. (2nd) 489;
>
> *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937:

The Winfield S. Cahill, 258 Fed. 318;

Aktieselskapet Bonheur v. San Francisco & P. S. S. Co., 287 Fed. 679;

The North Star, 151 Fed. 168;

Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. Ed. 1006;

Central Coal & Coke Co. v. Hartman, 11 Fed. 96;

M'Cormick v. United States Mining Co., 185 Fed. 748;

Swift & Co. v. Johnson, 138 Fed. 867;

Homestead Co. v. Des Moines Electric Co., 248 Fed. 439;

Malone v. Hastings, 193 Fed. 1;

Gibson v. Hercules Mfg. etc. Co., Inc., 80 Cal. App. 689;

Blankenship v. Lanier (Ala.), 101 So. 763;

Carolene Sales Co. v. Canyon Milk Products Co. (Wash.), 210 Pac. 366;

Schulz v. Gether, 198 N. W. 433.

II.

It is the legal duty of one who claims a loss of profits for the use of a vessel pending repairs, arising from a collision, to use due diligence to reduce the amount of the alleged damages.

The Mascot, 282 Fed. 766;

Penn. R. R. Co. v. Washburn et al. (D. C.), 50 Fed. 335;

The Oregon, 55 Fed. 666, 673, 5 C. C. A. 229;

Wicker v. Hoppock, 73 U. S. (6 Wall.) 94, 99, 18 L. Ed. 752;

Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117.

THE ARGUMENT.

At the outset let us call the court's attention to the fact that there is no material conflict in the evidence covering any point raised in this brief, with this explanation, that there is a slight conflict in the evidence as to the sea and weather conditions in the San Clemente waters at the time in controversy. This, however, in our opinion, is not substantial, neither is it controlling.

Practically the entire record is devoted to the question of whether or not the appellee procured the repairs to the damaged steamer "Lansing" as expeditiously as was reasonably possible, and whether, after the repairs were completed, the appellee's vessel put to sea and arrived at the whaling grounds as quickly as was reasonably possible, and without unnecessary delay. There was a hopeless conflict in the evidence relating to these two matters and, for that reason, we will assume, on this appeal, that the findings of the trial court are conclusive as to (a) repairs having been made as expeditiously as reasonably possible, and (b) that the appellee took its steamer "Lansing" to sea and to the whaling waters without unnecessary delay after the repairs were perfected.

We will rely, therefore, in this appeal, on error No. 1 [Apost. p. 358]; error No. 2 [Apost. p. 359]; error No. 3 [Apost. p. 359]; error No. 7 [Apost p. 360]; error No. 9 [Apost. p. 361]; error No. 10 [Apost. p. 361]; error No. 11 [Apost. p. 362].

A New Floating Whaling Factory.

The prospective profits that would have been earned by appellee in fishing for whales in the San Clemente waters, during the time that the vessel was detained for repairs, were entirely too speculative, conjectural and remote to be the subject of legal damages, because, in the first place, the appellee was going to put into use an entirely new floating whaling factory.

The "Lansing" was purchased by the appellee in June, 1926, from the Union Oil Company. It was an old tanker and had been used by the Union Oil Company for many years. The "Lansing" was not only a very old vessel but also of very poor design. As said by E. B. Egbert, one of appellee's witnesses: "She was one of the first tankers built. She is probably the poorest design of tanker that there is." [Apost. p. 335.]

The work of converting the vessel into a floating factory was done in the Bethlehem shipyards, and the work commenced thereon September 16, 1926. New machinery was installed in it for the purpose of fitting it up as a floating reduction plant.

At the time of the collision the three tanks aft on the "Lansing" had been completed and had been fully tested, but the three tanks forward were in the process of being tested, and the work was not finished at the time of the collision. [Apost. pp. 40, 103.] In other words, at the time of the collision the "Lansing" had not been completely converted from a tanker to a floating whaling factory. [Apost. pp. 43, 44, 45, 49, 53.] In converting this steamer into a floating whaling factory the appellee

was placing 16 boilers or digesters in the vessel for the purpose of cooking the whale meat, blubber and bone. [Apost. p. 44.]

Prior to that time, the appellee's whaling business was conducted through the agency of what are termed killer tugs which went out and captured the whales and brought them to land stations for reduction, that is, to stations situated on land, where the manufacture of whale oil and other products was carried on. [Apost. pp. 38, 43, 53, 58, 63, 89, 101.] Let it be noted that never before had the appellee used either this floating whaling factory or any other similar floating factory. This is demonstrated by the following testimony:

> "Q. Had you ever been employed on any tankers before? A. No, not before.
>
> Q. And had you ever had any experience in the handling of a floating factory like this before? A. No, sir." [Apost. p. 77.]

Starting out on a whaling voyage with an entirely new outfit, the like of which had never before been used by appellee, made the outcome of the expedition a matter of pure speculation.

New Arrangement Wholly Untried.

The loss of prospective profits was further highly speculative because of the fact that this new floating whaling factory, after being built, first had to be tried out to ascertain whether it would work. At the time of the collision it was still necessary to test and repair the bulkheads, as above noted, after which the vessel would be loaded with water, fuel oil and coal. It was also contemplated that the

new machinery placed in the steamer would be tried out by procuring a whale *somewhere*, putting it through the equipment. [Apost. pp. 46, 84, 95, 96, 99.] This is shown by the following testimony:

> "We put on board a lot of new machinery,—cookers, slicers, conveyors, pipes and so forth, and our program was this from the beginning: That as soon as we had this equipment installed and ready for operation in San Francisco we would send one of our whalers outside of the Farallones or Point Reyes and bring in a whale and put that whale thru our equipment to see if every thing worked all right before we went to the whaling grounds. That was our intention right along and that is what we did [Testimony of F. K. Dedrick]; while we were waiting for the coal to be resacked we went to California City and waited there three or four days, waiting for a whale. We had sent the 'Hawk' out to bring in a whale and we were waiting there for the whale to be brought in.
>
> Q. And you sent the 'Hawk' out in due course of time and got [61] the whale? A. Well, she didn't bring it in, because she didn't get any; and it was too expensive to lay her up there too long, to lay the 'Lansing' up there too long, so we got ready and went to sea without trying the machinery out." [Apost. pp. 66, 67.]

Although the appellee attempted for three days to capture a whale in the vicinity of California City, none was found. [Apost. p. 80.] The purpose of this proposed trial was to test out the reduction machinery. [Apost. p. 75.]

Inasmuch, therefore, as no test of the new floating whaling factory had been made, prior to the arrival in the San Clemente waters, the success of the undertaking was still more dubious.

Fishing in New Waters.

Another element of speculation entered into the undertaking because of the fact that never before had the appellee fished for whales in the San Clemente waters. Whenever whale fishing had been undertaken, theretofore, when operating to and from appellee's two land stations, the waters of San Clemente Island had not been included in its territory. There had been no data derived from appellee's fishing, in either these or similarly situated waters, from which it could be ascertained, with any reasonable degree of certainty, that whales could be found there. Furthermore, there was no evidence that anyone else ever fished for, or captured, whales in the San Clemente waters. In all the whale fishing expeditions, numerous as they no doubt were upon the high seas, no record was found where anyone had ever fished for whales in the San Clemente waters. The undertaking, therefore, on account of the venture into new and untried waters, made the expedition highly problematical.

Weather and Sea Conditions Problematical.

As to whether weather and sea conditions in the waters of San Clemente were favorable for the capture of whales from December 13th to December 19th, is wholly a matter of conjecture.

The appellee offered some testimony purporting to show the wind and weather conditions in the San Clemente waters covering this period, but such evidence was of no probative value. The observations as to these conditions were made at Point Arguella. [Apost. p.

125.] The nearest approach to similarity between conditions at Point Arguella and San Clemente waters was given by the testimony of observer Thomas R. Reed, who said he thought that "conditions prevailing at Point Arguella, as bearing upon the likelihood of similar conditions prevailing at the southern point of San Clemente Island and the waters off the southern part of San Clemente Island would reflect wind conditions *to a degree.*" [Apost. p. 127.] Then he gave the velocity of the wind, according to observations made at Point Arguella, during the six day period. Among these observations let it be noted that on the afternoon of December 15th, he found the wind was blowing 28 miles an hour, and on December 18th, from 22 to 30 miles an hour, and on December 19th, from 18 to 36 miles an hour. [Apost. pp. 128, 129.] Appellee's witness Dedrick testified that you can fish for whales with a wind velocity around 20 miles per hour, but clearly implied that whale fishing could not be carried on with a higher wind velocity, at least not unless the fishing boat happened to be in the shelter "or the lea side of an island." [Apost. pp. 159, 160.] Let it be observed that Point Arguella is situated "slightly to the west of Point Conception, which is the point jutting out into the ocean at the dividing line between what we call Northern and Southern California." [Apost. p. 129.] Point Arguella, therefore, is somewhat between 100 and 150 miles north of the San Clemente waters. [Apost. p. 129.] Let it be noted, further, that these observations made at Point Arguella were *land* observations, and the witness Thomas R. Reed truthfully said: "If you go out west it is conceivable

that you might have a storm at sea while the winds have not yet reached the coast at all." [Apost. p. 131.] And then Mr. Reed made a very pertinent observation in testifying: "One of our troubles in the Weather Bureau is the fact that there isn't enough ships. I have turned over a number of reports without finding one with a ship's report on it." [Apost. p. 132.]

Appellee's witness F. K. Dedrick testified that "If it is too rough you can't chase whales." [Apost p. 145.] And admitted that on December 19th, when the wind at Point Arguella was above thirty miles an hour, that it was impossible to carry on whale fishing. [Apost. p. 146.] However, the witness Dedrick stated what is obviously true, that the real factor, in determining whether the weather conditions were favorable to sea fishing, was, not the wind velocity, but rather *the condition of the sea.* He stated that if the water is "choppy" fishing cannot be carried on. Then Mr. Dedrick admitted that the wind conditions on land do not, necessarily, determine the condition of the waters of the ocean, when he said: "You may have big sea sometimes, and a long swell that don't hurt you at all, and it may be deal calm and still have that long swell. Then you may have only a sharp break and it will be choppy and hard to pursue whales, and hard to handle." [Apost p. 159.] He further testified "some times you will have a big sea and no wind, sometimes when it is blowing a long ways offshore." [Apost. p. 166.]

It appears, therefore, from the foregoing testimony, that whether the sea condition at San Clemente Island was favorable for whale fishing, during these six days, was highly problematical and speculative. It does appear, positively, from this record, that on at least three of these days the sea conditions were most unfavorable, on account of the high wind.

The Number of Whales Captured Subsequent to December 19th, 1926, Was of No Probative Value.

The evidence is wholly insufficient to sustain the finding that the appellee would, with reasonable certainty, have captured six whales between December 13th, 1926, and December 19, 1926. The theory of the appellee was stated by Proctor Sawyer, as follows:

> "Now, if Your Honor please, we have some statistical data showing the whales that actually were caught after they arrived at the southern end of San Clemente Island, and upon the basis of that data we have compiled the cost per whale and the revenue per whale, and on the basis of that data we have ascertained the average daily catch of whales. We propose to use that figure for the purpose of estimating the catch that would have been made during the preceding six days [130] had we been there." [Apost. p. 148.]

Then Proctor Sawyer further stated:

> "We are going to compare that with our experience in other years, when they were there earlier, showing what conditions were; that is the only way we can get at it." [Apost. p. 168.]

It will be observed, however, in the record, that the appellee never fished for whales in the San Clemente waters prior to this time and that the only time that appellee ever fished there, other than the time complained of, was a year subsequent thereto. The only time appellee ever fished in the San Clemente waters before December 19, was *in the following year* of 1927. [Apost. p. 170.]

The only thing, therefore, that appellee has in the record that tends to prove, even in a remote manner, the probability of any catch of whales between December 13th and December 19th, 1926, is the tabulated record of

whales that were *subsequently caught* in the San Clemente waters. This tabulation is found on pages 190 to 211 of the Apostles. It shows the catch of whales beginning December 19, 1926, and ends with the date of January 14, 1928. The appellant claims that this record of whales caught, *subsequent to the period complained of,* is immaterial, irrelevant and incompetent, and is of no probative value to establish the fact that any particular number of whales would be captured between December 13th and December 19, 1926, with any degree of certainty. It will be noted that no whales were captured on December 19, 1926, December 22nd, 1926, December 24, 1926 [Apost. p. 190], Jan. 2, 1927, Jan. 3, 1927 [Apost. p. 192], Jan. 21, 1927 [Apost. p. 195], Jan. 29, 1927, Jan. 30, 1927 [Apost. p. 197], Dec. 6, 1927 [Apost. p. 205], Dec. 18, 1927 [Apost. p. 207], Dec. 21, 1927, Dec. 24, 1927, Dec. 25, 1927 [Apost. p. 208], Dec. 29, 1927, Dec. 30, 1927, Dec. 31, 1927, Jan. 2, 1928, Jan. 4, 1928 [Apost. p. 209], Jan. 7, 1928, Jan. 10, 1928, Jan. 11, 1928, Jan. 12, 1928 [Apost. p. 210], Jan. 14, 1928 [Apost. p. 211].

This record, therefore, shows conclusively that the appellee had no established business that was interrupted by the detention of the vessel on account of the collision.

Whales Not Uniform in Size.

Another difficulty that confronted the appellee, and made the fishing expedition wholly and purely speculative, was that it was impossible to determine, even if whales should be caught, what the size of the whales would be. This is readily observed from the following testimony:

"Mr. Kent: Q. Do those whales vary per whale, that is, the heaviest whale and the lightest whales would vary approximately how many barrels?

Captain Dedrick: Sometimes we get one that won't go ten barrels, and then we get some that go sixty barrels. You see, we have taken an average.

Mr. Kent: I understand from the captain now that they would run anywhere from ten to fifty barrels?

Captain Dedrick: Yes, sometimes sixty." [Apost. p. 179.]

Appellee Was Engaged in a New Undertaking, Wholly Untried.

Some time prior to the date of the damage to the "Lansing", which was on November 16, 1926, the appellee had been in the business of capturing whales and reducing them into products to be sold. Just what waters the appellee frequented, in its pursuit of whales, is not clear. It is clear, however, that after whales were captured they were brought to land and rendered into saleable products from two land stations. But, in September, 1926, the appellee conceived the idea of having the tanker "Lansing" converted into a floating whaling factory. This was a new undertaking. Never before had the appellee made any attempt to convert the whales into saleable products at sea. The results to be obtained in this new venture were speculative to the highest degree. The appellee had never had any experience of a like nature to guide it. It might be a success and it might be a failure. But, which ever it turned out to be there were no precedents. It was a venture upon an unknown sea. While the appellee's experience in rendering saleable products out of whales

from its land factories served to guide it, in somewhat of a general way, it well knew that the conditions would not be the same in the new venture. In the floating whaling factory new conditions were to be met with that had never confronted appellee before. Necessarily there would be a consideration of matters that had never occurred to appellee before. It was wholly a new undertaking, a radical departure from the accustomed practice.

Another new feature to this new undertaking, and of even greater importance than the one just considered, is the fact that the appellee proposed to fish for whales in new waters. Appellee never fished in the San Clemente waters before December 19th, 1926. It was without experience there, and consequently without precedents. It was not known whether it would be able to catch any whales in that locality, based upon its own experience there. Appellee had no idea whether it would be able to catch one whale a day, ten whales a day or no whales at all, based upon its own experience, because it had had no experience there. Appellee's experience there was wholly *infuturo*. This circumstance, therefore, rendered this new undertaking still more speculative and problematical.

Furthermore, there is no evidence in the record that anyone else ever captured whales, or even fished for whales, in the San Clemente waters prior to December 19, 1926. There was, therefore, no available data from which it could be calculated that the appellee had any reasonable probability of capturing whales in those waters.

From a consideration of these factors we are pressed to the inevitable conclusion that this was wholly a new under-

taking, without precedent and wholly speculative in character. We submit, from a consideration of the above, that the appellee had no regular and established business of catching whales, or rendering its products from a floating whale factory, in the San Clemente waters, and that, consequently, any loss of profits, on account of losing these six days' fishing, could not be ascertained, in the absence of available data. We submit that this new venture was dependent upon such numerous and uncertain contingencies that the speculative profit therefrom was not susceptible of proof with any reasonable degree of certainty. We submit that profits that are thus speculative, remote and uncertain may not form the basis of a lawful judgment. The destruction or interruption of an established business is one thing, but to be prevented and delayed from embarking in a new business and undertaking is quite another thing. We submit that the facts here puts the appellee in the latter class and that, as a consequence thereof, the appellee was not entitled to judgment for the loss of any speculative profits.

Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.

For a leading case covering the above and well established legal proposition we invite the particular attention of this Honorable Court to the extremely well considered opinion of Judge Sanborn, in *Central Coal & Coke Company v. Hartman,* 111 Fed. 96, quoted at length hereafter.

AUTHORITIES.

In *Cuyamel Fruit Co. et al. v. Nedland et al.*, 19 Fed. (2nd) 489, the court said:

> "Demurrage or damages for the loss of profits or of the use of a vessel pending repairs, arising from a collision, are allowable only when profits have actually been, or may reasonably be supposed to have been, lost, and the amount of such profits is proved with reasonable certainty."

In *The Nantasket*, 290 Fed. 813, the court said:

> " 'It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty.' 166 U. S. 125, 17 Sup. Ct. 516, 41 L. Ed. 937. 'The difficulty is in determining when the vessel has lost profits and the amount thereof.' 166 U. S. 127, 17 Sup. Ct. 516, 41 L. Ed. 937. 'It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel.' 166 U. S. 133, 17 Sup. Ct. 519, 41 L. Ed. 937. 'In other words, there must be a loss of profits in its commercial sense.' 166 U. S. 133, 17 Sup. Ct. 519, 41 L. Ed. 937. * * * It has been the general understanding in this country, I think, that damages for detention are not recoverable in collision cases without proof of actual pecuniary loss caused thereby. The Saginaw (D. C.), 95 Fed. 703; The Loch Trool (D. C.), 150 Fed. 429; Fisk v. City of New York (D. C.), 119 Fed. 256; The Mayflower, Fed. Cas. No. 9,345."

In *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937, the Supreme Court of the United States said:

> "The mere opinion of witnesses, unfortified by any data, as to what the earnings would probably

have been, is usually regarded as too uncertain and conjectural to form a proper basis for estimation, though in a few cases they seem to have been received. The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs."

In *The Winfield S. Cahill,* 258 Fed. 318, the court said:

"Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made."

In the *Aktieselskapet Bonheur v. San Francisco & P. S. S. Co.,* 287 Fed. 679, the court said:

"Where the damages alleged to have been sustained in the interim of detention arise by reason of loss of earnings, the inquiry is not whether they could possibly have been made by the use of the vessel, but whether they would have been made. * * *

"The authorities seem to lead to but the one conclusion, that damages for loss of the use of a vessel while undergoing repairs made necessary by collision will only be allowed when it is shown that she could have been profitably employed during the period of her detention for repairs. The Loch Trool (D. C.), 150 Fed. 429."

In *The North Star,* 151 Fed. 168, the court also said:

"The inquiry is determined by the same rules of law which obtain when the owner of any other kind of property seeks compensation for the profits lost by the wrongful interruption of its use."

We will now refer to a few of such cases.

In *Boston & Albany R. R. Co. v. O'Reilly,* 158 U. S. 334, 39 L. Ed. 1006, the Supreme Court of the United States, speaking through Mr. Justice Shiras, said:

"It is equally obvious that the fate of a new venture was merely conjectural. Such evidence is too uncertain to be made the basis of a verdict for damages."

In *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, Judge Sanborn announces this rule as follows:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; Trust Co. v. Clark, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; Simmer v. City of St. Paul, 23 Minn. 408, 410; Griffin v. Colver, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established busi-

ness may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. *He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced.* 1 Sedg. Dam. 183; Red v. City Council, 25 Ga. 386; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Greene v. Williams, 45 Ill. 206; Hair v. Barnes, 26 Ill. App. 580; Morey v. Light Co., 38 N. Y. Super. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business *without proof of the expenses and income of the business for a reasonable length of time before as well as during the*

interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In Goebel v. Hough, 26 Minn. 252, 258, 2 N. W. 847, 849, the supreme court of Minnesota said:

'When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are.'

The truth is that *proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import is indispensable to a lawful judgment for damages* for the loss of the anticipated profits of an established business. Goebel v. Hough, 26 Minn. 252, 256, 2 N. W. 847; Chapman v. Kirby, 49 Ill. 211, 219; 1 Sedg. Dam. 182; Ingram v. Lawson, 6 Bing. N. C. 212; Shafer v. Wilson, 44 Md. 268, 278."

This opinion by Judge Sanborn is a leading case on the principle announced.

In *Gibson v. Hercules Mfg. etc. Co., Inc.* 80 Cal. App. 689, the Court of Appeal of California has this to say:

"There is, however, another matter which goes to the very vitals of this action and precludes the possibility of plaintiff's recovery, which is best stated in section 118, 17 C. J., page 797: *'Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business,* and its profits are speculative

and remote, existing only in anticipation.' The paragraphs of the complaint which we have copied show that no business has ever been transacted, that no locks have ever been manufactured and no locks have ever been sold. The alleged loss of profits relates *not to the interruption of the business of a going concern*, but is remote, contingent, speculative, existing only in anticipation, without any tangible basis upon which to predicate any loss whatever. The allegation that the plaintiff *could have done this and could have done that*, if the defendant had done something else, furnishes no facts upon which to predicate a judgment. The past profits of a going concern, if any, may be ascertained when its business is interrupted, *but the fact of profits to be realized from a business about to be launched can exist only on paper* and while profits may be possible, losses in the enterprise are just as possible, and in either case, *they are nothing more than contingent probabilities.* In California Press Mfg. Co. v. Stafford Pack. Co., 192 Cal. 479 (32 A. L. R. 114, 221 Pac. 345), the Supreme Court of this state says: 'As a proposition of law it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. Kettering v. Sheppard, 19 N. M. 330 (142 Pac. 1128). *Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.* (17 Cor. Jur. p. 797, sec. 118; Shoemaker v. Acker, 116 Cal. 239, 244 (48 Pac. 62). The rule is one of necessity. Damages must be certain of ascertainment. If one engages in a new industry, *there are no probable data of past business* from which the fact can be legally deduced that anticipated profits would have been realized. (Central Coal Co. v. Hartman, 111 Fed. 96, 99 (49 C. C. A. 244).' In Central

Coal Co. v. Hartman, *supra,* we find the following: *'He who is prevented from embarking in a new business can recover no profits,* because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced,' citing a number of authorities.

"In 8 Cal. Jur., page 777, the distinction is clearly drawn by the text writer as to when loss of profits may be allowed. *If the business is established and is interrupted, past profits* furnish the basis for calculating the damage. If the business is unestablished, such anticipated profits are held to be remote, uncertain, and speculative, on the ground that no satisfactory statement of the loss can be made. To state it in different language: No one can say that any profits would ever have been realized. The rules which we are here stating relative to loss of future profits are also clearly set forth in Shoemaker v. Acker, 116 Cal., at pp. 244, 245 (48 Pac. 62). The substance of the holding there is that *when the business prevented or interrupted is an established one, a basis for allowing damages is found in the past profits of the concern,* but if no business has ever been done, no profits earned, the possibility of proving profits does not exist, and no court can determine whether there would be profits, or whether the prospective business would not rather result in losses. To the same effect is the case of McConnell v. Water Co., 149 Cal. 65, 66 (8 L. R. A. (N. S.) 1171, 85 Pac. 929). Since the briefs were written in this case, the leading case, California Press Mfg. Co. v. Stafford Pack. Co., above referred to, reported in 192 Cal. 479 (221 Pac. 345), has been re-reported in 32 A. L. R. 114, to which has been appended annotations covering thirty-six pages. On page 126 of the same volume, under the subtitle setting forth the rule of law that no recovery can be had for losses of profits, which are uncertain, speculative, contingent, and conjectural, is collated authorities from nearly every state in the Union, showing an unbroken line of decisions confirming the principle set forth in the case of California Press Mfg. Co. v. Stafford Pack. Co., *supra,*

and on page 153 of the same volume, under the subtitle dealing with the rule relating to anticipated profits of an unestablished busines, is also collected a long list of decisions showing the unanimity of courts in upholding such doctrine. The cases collected and appended in the notes to the principal case, reported in 32 A. L. R. 120, are so extensive and so numerous that it is unnecessary to do more than cite the volume and page of said work to show that plaintiff has no cause of action on account of his alleged loss of anticipated profits, based upon unrealized hopes of an unestablished business. Whatever damage he may have suffered, by reason of the acts of the defendants, must be based upon something tangible and not upon future prospects, and there being nothing of that character in the complaint, and nothing in the complaint other than what we have referred to, it follows that the judgment of the trial court should be affirmed, and it is so ordered."

In *McCormick v. United States Mining Co.*, 185 Fed. 748, (8th Circuit) this principle is announced:

> "The law with respect to loss of profits being the basis of a recovery in an action for damages is that profits which would have been realized, but for the act of defendant, and which are not open to the objection of uncertainty or remoteness, may be recovered, but profits depending upon numerous uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages. Howard v. Stillwell & Pierce Mfg Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Coosaw Min. Co. v. Caroline Min. Co., et al., (C. C.) 75 Fed. 860; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Cincinnati Gas Co. v. Western Siemens Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305."

In *Swift & Co. v. Johnson*, 138 Fed. 867, (8th Circuit) the principle is stated thus:

"This court is therefore controlled by the rule of general law applied by the federal courts, which, in respect of the right to and the assessment of purely compensatory damages, excludes all consideration of matters which result in speculation, conjecture, or fancy. Richmond & Danville R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; Boston & Albany R. Co. v. O'Reilly, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1006; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142."

In *Homestead Co. v. Des Moines Electric Co.*, 248 Fed. 439, (8th Circuit) the principle is again announced as follows:

"It is true that the general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98, 99, 102, 49 C. C. A. 244, 246, 247, 250."

In *Malone v. Hastings*, 193 Fed. 1, (5th Circuit) the principle is announced in another way, as follows:

"From these authorities we deduce the rule to be that the probable ultimate value of a planted, but unmatured, crop can be used as a basis for assessing damages, when there is evidence of the actual matured value of other crops of a like kind, cultivated

during the same period, in the same vicinity, and under substantially similar conditions."

In *Blankenship v. Lanier*, (Ala.) 101 So. 763, the Supreme Court of Alabama, says:

> "The only exception seems to be that 'the loss of profits from the destruction or interruption of an established business may be recovered for, if the amount of actual loss is rendered reasonably certain by competent proof; but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one, and that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable.' 17 Corp. Jur. 795-797 (section 117), and cases cited under note 95. And 'where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied, for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.' *Id.*, 797 (section 118)."

In *Carolene Sales Co. v. Canyon Milk Products Co.*, (Wash.) 210 Pac. 366, the Supreme Court of Washington, says:

> "In Andreopulos v. Peresteredes, 95 Wash. 282, 163 Pac. 770, the rule of the case of States v. Durkin, 65 Kan. 101, 68 Pac. 1091, is approved where it was held that before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated."

The above principle is also cited with approval in *Schulz v. Gether,* 198 N. W. 433 (Wis.):

> "Profits depending on numerous, uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages."

It Was the Legal Duty of the Appellee to Use Due Diligence to Reduce the Amount of the Alleged Damages.

If there was a delay of six days in arriving at the San Clemente waters the appellee could have reduced and mitigated the amount of its alleged damages by remaining there six days longer. There is no evidence in the record that whaling was a seasonable occupation in the San Clemente waters. The only evidence in the record, as to whaling being a seasonable occupation anywhere, is that, at a point 30 miles north of Eureka the whales run until the end of October or the middle of November. [Apost. p. 63.] And that "in Alaska you can only operate in the summer time" [Apost. p. 64.] And that "off San Clemente in Southern California you can operate there the whole winter if you want to, if you find any whales down there." [Apost. p. 64.] Aside from the above, there is no testimony in the record that whaling was a seasonable occupation.

Even if it had been planned that the "Lansing" should arrive in the San Clemente waters on December 13, and even if there were proof that there was a reasonable probability that whales would be caught there at that time, the fact remains that, conceding the "Lansing" did arrive in San Clemente waters six days late, what was

there to prevent her staying and remaining in the San Clemente waters six days longer than she planned to stay or did stay? The only evidence we have of there being any fishing seasons in the San Clemente waters is the aforesaid statement of Mr. Dedrick, and he says that you can operate there the whole winter if you want to, if you find any whales down there. Therefore, if the appellee suffered any loss, even though it was highly speculative, by the reason of the fact that the "Lansing" arrived six days late in the San Clemente waters, the appellee, so far as the records show, had abundant opportunity to recoup its loss by staying there six days longer at the end of the fishing trip. The record contains no showing that the appellee had to leave the San Clemente waters at any particular time and fails to show that the whale fishing season ended at any particular time. Suppose, for an example, that we fit up a launch and plan to put to the open sea a few miles to catch a thousand mackerel. Assume also, which is contrary to the showing here, that we had an established business at the place where we propose to fish for the mackerel and where our probable catch would be ascertainable, with a reasonable degree of certainty. Suppose through some damage to our craft we are delayed six days in getting out to sea. Now what will prevent our staying there and remaining in the waters six days longer, to enable us to catch the thousand fish? In general, there would be but two reasons why we could not remain the six days at the end of our scheduled trip. Either the fishing season would be over, or it were absolutely compulsory for us to get back to land at a particular time, because of the necessity of having something else to do.

Now, in this case the record is silent that there was an end to the whale fishing season. And the record is also silent that there was anything at all that prevented the appellee from staying in the San Clemente waters six days longer than it had planned to remain there. No reasons were given for leaving the San Clemente waters. We must conclude, therefore, from the statement of Mr Dedrick, that the appellee could have operated there the whole winter if it had cared to. There was then no reason why the appellee could not have remained in those waters six days longer and recouped any damages it may have suffered by reason of the alleged six days delay in arriving there.

Under the law it was the duty of appellee to use due diligence to reduce the amount of the alleged damages.

"The Mascot," 282 Fed. 766;

Penn. R. R. Co. v. Washburn et al. (D. C.), 50 Fed. 335;

"The Oregon," 55 Fed. 666, 673, 5 C. C. A. 229;

Wicker v. Hoppock, 73 U S. (6 Wall.) 94, 99, 18 L. Ed. 752;

Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117.

Summary.

We have shown that the prospective profits, for which judgment was entered, were too speculative, conjectural and remote to be the subject of legal damages; that the reasons why the prospective profits were so highly speculative were:

1. That the floating whaling factory was an entirely new arrangement, nothing similar to it having ever been used by the appellee;

2. That this new floating whaling factory had not yet been tried out, and it was, therefore, uncertain as to whether it would work as contemplated;

3. That the appellee was planning to fish for whales in new waters—a place where it had never before fished for whales.

4. That no one else, so far as the record shows, had ever fished for whales in the San Clemente waters, hence there was no available data from which loss of profits could be computed with any reasonable degree of certainty.

5. That as to whether the weather and water conditions in the San Clemente waters were favorable for whale fishing, from December 13th to December 19th, was wholly problematical and uncertain.

6. That even though whales were captured, the size of the whales differed greatly—some producing less than ten barrels of whale oil, others producing as high as sixty barrels of whale oil—and it was, consequently, further impossible to determine the amount of the loss, if there was any loss, with any reasonable degree of certainty.

7. That the only evidence of whales captured in the San Clemente waters was subsequent to the 19th of December, 1926, and hence wholly incompetent and of no probative value to prove that any particular number of whales would have been captured in the San Clemente waters prior to that time.

8. That there was no competent evidence that whaling was a seasonable occupation in the San Clemente waters, hence the appellee could have mitigated its damages by remaining in those waters for a longer period.

In view of the above, therefore, the appellant prays that the final decree of judgment of the United States District Court, for the Northern District of California, Southern Division, made and entered on the 17th day of November, 1930, be reversed.

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H. K. LOCKWOOD,
Proctors for Appellant.